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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

December 5, 1995

HAND DELIVERED

Scott Blake Harris, Esquire
Chief, International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems (IB Docket No. 95-41): Written Ex Parte Presentation of the Motion Picture Association of America, Inc.

Dear Mr. Harris:

This letter is submitted on behalf of the Motion Picture Association of America, Inc. ("MPAA"), which filed Comments and Reply Comments in the above-referenced proceeding. This letter provides brief additional clarifying information in response to questions raised during a meeting in your office with representatives of MPAA and Capital Cities/ABC. (That meeting has been previously noted for the record in this proceeding.)

In its filings in this proceeding MPAA recommended that the Commission build into its liberalized rules a series of easily administered steps to deter the unauthorized use of U.S. programming abroad under cover of, or as an unintended consequence of, FCC satellite authorizations.[1/] In its Comments, MPAA showed that such unauthorized use is a severe national problem and threat to the U.S. economy which, like drug abuse and employment discrimination, is within the Commission's power to affect in a positive way. Specifically, MPAA suggested that through discrete steps identified in its Comments and Reply Comments, the Commission can highlight the problem and help to prevent and minimize it.

1/ For convenience, attached are copies of the MPAA Comments and Reply Comments.

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You asked whether similar results could be achieved exclusively by invoking U.S. copyright law, thereby reducing the need for an FCC role. The negative answer we gave earlier is supported by the following factors, which underscore the opportunity the Commission has to address the problem now, and the need for that opportunity to be taken.

First, U.S. copyright laws "do not have any extraterritorial operation." 3 Melville B. Nimmer, Nimmer on Copyright 317.02 (1995). The only qualifications to this principle are that some plaintiffs may be able to establish that part of an act of infringement occurred in the U.S., or that a foreign finding of infringement can sometimes be a basis for a similar finding by a U.S. court. Id.

Difficult at best, such remedies would provide relief, if at all, only in the narrow circumstances described. Even then, relief would be only after the fact, and following completion of litigation that is often protracted, cumbersome and expensive. Simple deterrent steps by the Commission as part of its revised licensing process are a far more effective, expedient approach. Those steps have the potential to reduce, though not eliminate, the need for litigation when it can be brought.

Second, Section 111(a)(3) of the Copyright Act exempts from liability satellite carriers engaged in the passive retransmission of primary transmissions of television broadcast signals.[2/] The passive carrier exemption has been applied and upheld in cases such as Hubbard Broadcasting, Inc. v. Southern Satellite Systems, 593 F.Supp. 808 (D. Minn. 1984), aff'd, 777 F.2d 393 (8th Cir. 1985), cert. denied, 479 U.S. 1005 (1986), and Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983).

Thus, because U.S. copyright law has no extraterritorial effect, U.S. copyright owners do not have a remedy under that law against unauthorized recipients and users of satellite retransmissions in foreign countries. In addition, due to Section 111(a)(3) of our Copyright Act, U.S. programmers also lack a remedy against satellite carriers, licensed in the U.S., who qualify for the passive exemption. The net result is that

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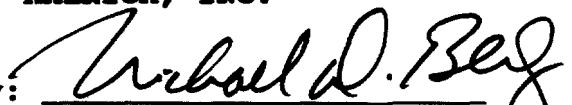
2/ A satellite operator is considered a passive carrier when it has "no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission" and when its activities "consist solely of providing wire, cables, or other communications channels for the use of others." 17 U.S.C. § 111(a)(3).

nothing in current law obviates the need for the Commission to take steps to deter the carriers it licenses from engaging in unauthorized retransmissions, and to encourage such carriers to minimize the unauthorized reception of their retransmissions abroad.

In sum, the reach of U.S. copyright law is limited in ways that make FCC incorporation of deterrent steps both useful and necessary to curtail a serious national problem and economic threat, which could be exacerbated as an unwanted side effect of the proposed new rules. The Commission cannot, and is not asked to, solve this problem completely, or to make copyright adjudications. But the Commission can and should, as it has in the past in this and analogous contexts, act to limit the misuse, intentional and otherwise, of its licenses for illegitimate purposes and to encourage "effective competitive opportunities" for U.S. entities abroad.[3/] Such action is complementary to U.S. copyright law, and is not obviated by it.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 
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Attachments

cc (via hand delivery): Mr. William F. Caton, Acting Secretary, FCC; Mark Grannis, Esquire; John M. Coles, Esquire; Karl A. Kensinger, Esquire; Virginia Marshall, Esquire

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3/ The approach recommended by MPAA is consistent with, and an appropriate complement to, the objectives and approach of the Commission's recent decision in the "Market Entry and Regulation of Foreign-Affiliated Entities" docket. Report and Order, IB Docket No. 95-22, FCC 95-475, released November 30, 1995.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	
Regulatory Policies Governing	)	IB Docket No. 95-41
Domestic Fixed Satellites and	)	
Separate International Satellite	)	
Systems	)	

To: The Commission

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

1. The Motion Picture Association of America, Inc. ("MPAA")[1/], by its attorneys, respectfully submits these Comments in response to the "Notice of Proposed Rulemaking" released April 25, 1995, in this proceeding ("Notice"). MPAA represents the leading United States producers and distributors of motion pictures and television programming. That programming is distributed domestically and worldwide by multiple technologies and distribution mechanisms, including the types of satellite systems which are the subject of the Notice. MPAA and its member companies therefore have a significant stake in the proposals in the Notice, and in the manner of their implementation.

2. These Comments detail a two-part MPAA position in response to the Notice. First, MPAA supports the thrust of the proposals, which are intended to increase the number and variety

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1/ MPAA's member companies include Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal Studios, Inc.; Warner Bros., a Division of Time Warner Entertainment Company, L.P.; and Turner Pictures.

of vehicles for the distribution of U.S.-produced programming, and to promote competition in satellite services. Second, MPAA urges the Commission, in implementing the proposals, to recognize explicitly that an unwanted side effect of liberalized distribution can be an increase in the unauthorized interception and use of U.S. programming abroad. Although the Commission cannot solve this problem completely, it can and should act to deter the piracy of U.S. programming product under color of FCC authorization. Accordingly, MPAA advocates continuation of existing FCC policy of conditioning transborder licenses upon copyright protection, and, in light of the new licensing rules, adoption of several further steps now which build upon procedures already in use. For example, the Commission should expressly include protection of copyright interests as one of the "subject to" conditions under which domestic satellite systems ("domsats") may provide services between the U.S. and noncontiguous foreign points on the same basis as "separate systems" (Notice, para. 18). Other steps are described in paragraphs 9 through 12 below.

3. Based upon a changed and increasingly global programming marketplace, the Notice proposes to eliminate historic service limitations on domsats, and to allow them to provide service internationally as well as domestically. At the same time, the Commission would free international separate system providers to offer both U.S. domestic and international service on a co-primary basis with U.S. domsats. This would end the current restriction of separate system provision of domestic

service only on an "ancillary" basis. The net of these proposals would be to allow all U.S.-licensed satellite operators to offer domestic and international services on a co-primary basis, thereby "[p]ermitting all operators to provide the widest range of service offerings technically feasible and consulted by Intelsat . . . [so as] to use their satellites more efficiently and to provide innovative and customer-tailored services" (Notice, para. 21). The Commission also expects increased competition in satellite services, particularly as "[n]ewer generations of satellites . . . can be configured to provide both international and domestic services on a co-primary basis" (Notice, para. 22).

4. As companies who are in the business of providing programming to please customers, including programming that is innovative and customer-tailored, MPAA members endorse these Commission goals. The fewer the barriers to competition in the provision of satellite services, the smaller the potential for bottleneck provider control. In multiple contexts, MPAA has historically supported proposals which contribute to the unimpeded flow of programming from producers to viewers.[2/] Consistent with this historic concern, MPAA applauds the direction of the proposals in the Notice. To the extent that outmoded barriers to the free and legitimate flow of programming are eliminated, U.S. programmers and viewers, and the U.S.

2/ For example, MPAA filed Comments in a similar vein on March 21, 1995 in the pending video dialtone proceeding (CC Docket No. 87-266).

economy as a result of distribution of U.S. programming abroad, all benefit significantly.

5. At the same time, in taking the steps to achieve these laudable ends, the Commission must assure that it does all that it can to avoid inadvertently increasing the unauthorized use, distribution and interception of U.S. programming, particularly (but not only) abroad. The potential for such an increase, both with respect to U.S. licensees and recipients of their distributions, is inherent in the proposals of the Notice. The rights to programming currently carried by domsats are usually cleared for domestic use only. A domsat's copyright clearances will not automatically expand to include transborder delivery newly authorized by the Commission. Abroad, liberalized distribution under FCC authority must not provide cover for the unauthorized reception or interception of U.S. programming product. Current FCC policies, such as the conditioning of licenses upon copyright compliance, must be restated and expanded to address the potential to exacerbate the already serious problem of piracy of U.S. programming.

6. Steps taken now and historically by the Commission, other federal agencies and the Congress have addressed, and helped to reduce, this massive problem. The problem, however, continues as a major drain upon the U.S. economy, even without the potential inherent in the proposed new rules. A February, 1995 report to the Office of the U.S. Trade Representative ("USTR"), for example, listed total piracy losses for all U.S.

copyright industries at $8.57 billion for 1994. $1.47 billion of that total was attributed to theft of U.S. films and entertainment programs.[3/]

7. The importance of this sector to the total U.S. economy dramatizes the need for the Commission to take appropriate action. Total worldwide revenues (U.S. and foreign) for the U.S. filmed entertainment industry were $20.4 billion. Total foreign revenues were $8.4 billion; without unauthorized use, that total would have been $9.87 billion. The U.S. copyright industries of which MPAA members are a part (including movies, television programs, home videos, books, music, sound recordings and computer software) accounted for 3.7% of the U.S. Gross National Domestic Product in 1993, and provided 3,000,000 jobs. In 1993 the copyright industries contributed more to the U.S. economy, and employed more workers, than any single manufacturing sector (including aircraft, primary metals, textiles, apparel or chemicals).[4/]

3/ Annual "Special 301" Report of the International Intellectual Property Alliance to the USTR, Appendix A, p. 2 (February 13, 1995). The USTR and the President have the power under Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, to take retaliatory action against countries which burden U.S. commerce. This explicitly includes copyright protection pursuant to "Special 301," Section 2242 of 19 U.S. Code, which requires the USTR to identify annually foreign countries that "deny adequate and effective protection of intellectual property rights, or deny fair and equitable access to United States persons that rely upon intellectual property protection." Id.

4/ Copyright Industries in the U.S. Economy: 1977-1993, prepared for the International Intellectual Property Alliance by Steven E. Siwek and Harold Furchtgott-Roth of Economists Incorporated, Executive Summary IV-V (January, 1995).

8. As a result, there are at least two major public interest bases for the Commission to build copyright considerations into the center of its new satellite regulatory approach. One is the need to assure that Commission processes are not abused via the illegal use of U.S. programming product under color of FCC authority. The significant modernization of satellite regulation proposed in the Notice must not be allowed to foster, inadvertently, a significant increase in the copyright problem. The second basis is the national interest in a strong economy and favorable balance of trade.

9. In paragraph 40 of the Notice, the Commission states that the issues discussed in the Notice "are not intended to represent the full range of considerations involved in implementing the proposed policy changes. We therefore invite . . . comment on any other issues raised by the proposed changes, including . . . whether any special requirements should be placed on satellite operators providing both domestic and international service" (Id.). In response to this invitation, these Comments raise the copyright issue as central to this proceeding, and MPAA recommends the steps described in the following paragraphs.

10. At a minimum, the Commission should continue its decade-old practice of conditioning all Orders and Authorizations for transborder satellite service upon copyright compliance. The Commission routinely qualifies authorizations in this area by an express indication that the authorization does not include the right to distribute "programming where the appropriate copyright

clearances have not been obtained or where the U.S. government has determined that appropriate copyright protection does not otherwise exist."[5/] Also consistent with past practice, the Commission should expressly exclude from authorizations service to countries where the FCC has been made aware of a lack of adequate protection for U.S. programming, and the delivery of programming as to which the Commission has been made aware of a specific unresolved theft of service problem.[6/]

11. The revision of Part 25 of Commission rules, including Section 25.140 ("Qualifications of fixed-satellite space station licensees"), should include the requirement that U.S. satellite licensees conform to copyright requirements and license conditions, and that violations can produce appropriate FCC sanctions. The FCC should make clear that it will consider adjudicated copyright felony convictions, or failure to comply with copyright conditions previously imposed, as affecting the qualifications of an applicant or licensee to retain, modify or

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5/ See, e.g., RCA American Communications, Inc., Order and Authorization, Mimeo No. 4294 (May 6, 1985); LMC Satcom, Inc. Order and Authorization, 7 FCC Rcd 7677 (November 25, 1992); Hughes Communications Galaxy, Inc., Order and Authorization, 7 FCC Rcd 8582 (December 16, 1992) (authorization for the Galaxy VII (H) and Galaxy IV (H) satellites); Associated Communications of Los Angeles, Inc., Order and Authorization, 8 FCC Rcd 4060 (June 15, 1993); Hughes Communications Galaxy, Inc., Order and Authorization, 8 FCC Rcd 7076 (September 28, 1993) (authorization for Galaxy VI and SBS-6 satellites).

6/ See, e.g., RCA American Communications, Inc., Mimeo No. 4294 at 8-9, n.4.

renew a Commission license for space and earth stations.[7/] Application forms for transborder authority should include a certification that the applicant will comply with copyright law and Commission-imposed copyright-related conditions, and will exercise reasonable diligence to prevent the unauthorized reception of programming and signals which it distributes. These steps are no more than an articulation of current policy in the revised context of the proposed amendments to the rules.[8/]

12. The Commission's policy with respect to copyright, and the specific steps taken to implement the policy, should be applied equally to all licensed providers, such as those offering mobile and direct broadcast satellite services (Notice, para. 38).

13. The Commission retains, and should so specify in its decision resolving this proceeding, authority and flexibility to take such other and additional steps as may be appropriate. The goal is to assure that liberalized authority to distribute programming abroad does not encompass authority to distribute U.S. programming illegally, or to fail to take adequate steps to

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7/ This approach is analogous to Commission actions with regard to proceedings and adjudications of the Equal Employment Opportunity Commission.

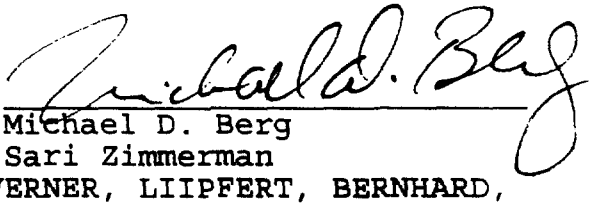
8/ For example, FCC Form 430, the satellite "Licensee Qualification Report," already asks about felony convictions.

preclude others from the illegal interception of U.S. satellite-delivered programming.[9/]

14. In acting as MPAA advocates here, the Commission will merely continue, and adapt, existing policy to conform to its new regulatory regime and to global conditions. In these ways the Commission will protect its processes from abuse as cover for the misuse of U.S. copyrighted material; will do what it can and must with respect to upholding U.S. national copyright law and policy; and will contribute to the strength of the U.S. economy and its competitiveness internationally.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 

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June 8, 1995

9/ The Commission was created in part "for the purpose of promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151. Copyright protection as national policy stems from the Constitution. U.S. Const. art. I, § 8.

BEFORE THE
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In the Matter of	)	
	)	
Amendment of the Commission's	)	
Regulatory Policies Governing	)	IB Docket No. 95-41
Domestic Fixed Satellites and	)	
Separate International Satellite	)	
Systems	)	

To: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

1. Having filed opening Comments on June 8, 1995 in this proceeding, the Motion Picture Association of America, Inc. ("MPAA")[1/], by its attorneys, submits these Reply Comments with respect to certain aspects of the opening comments of other parties.

2. In opening Comments MPAA supported in principle the proposed liberalization of restrictions upon domestic satellite provision of transborder services and separate system provision of services domestically. MPAA views these steps as in the public interest because they are likely to increase the free and

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1/ MPAA's member companies include Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal Studios, Inc.; Warner Bros., a Division of Time Warner Entertainment Company, L.P.; and Turner Pictures.

legitimate flow of programming from producers to viewers, affording both greater choice, and encouraging open markets. MPAA also flagged for the Commission the potential unwanted side effect of the proposals to increase the already serious unauthorized use of satellite-delivered U.S. program product abroad. To address this significant problem, MPAA urged the Commission to take a series of simple steps that are within the Commission's jurisdiction and responsibilities, and which would deter the abuse of FCC licenses as cover for illegal reception and retransmission of U.S. programming.

3. In addition to the multiple bases articulated by MPAA for such steps by the Commission, Capital Cities/ABC, Inc. ("Capital Cities"), in its "Additional Comments" filed June 8, 1995, describes an existing loophole related to the compulsory cable copyright license of Section 111 of the Copyright Act of 1976.[2/] MPAA supports, and amplifies briefly here, this concern.

4. Section 111 of the Copyright Act provides a mechanism for copyright owners to be compensated for the use, in the United States, of their copyrighted works in broadcast signals retransmitted by cable television systems.[3/] Because this mechanism exists, Section 111(a)(3) exempts from liability for

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2/ Additional Comments of Capital Cities at 2-4 (filed June 8, 1995); 17 U.S.C. § 111.

3/ Such retransmissions are MPAA's main, but not exclusive, concern in this proceeding.

copyright infringement a carrier's purely passive retransmission of broadcast signals containing copyrighted program material.[4/] Section 111(a)(3) expressly provides, however, that the exemption from liability applies only to secondary transmissions of the carrier, and does "not exempt from liability the activities of others with respect to their own primary or secondary transmissions."[5/] In other words, a carrier, such as an FCC-licensed satellite provider, is exempt from copyright liability, which is imposed in other ways by the compulsory license. But a carrier's customer (i.e., a cable operator), or someone who intercepts the carrier's transmission and uses or distributes it without authority, is liable for infringement.

5. Section 111 applies, of course, only within the U.S., not extraterritorially. If adopted, the proposals of the Notice in this proceeding are likely to increase the number of domestic satellite systems providing transborder service, and the number of separate systems providing domestic service. All systems will be able to provide both types of service on a co-primary basis. An unintended likely side effect is the creation of more than the already problematic number of satellite footprints which cover the U.S. but are also large enough to enable programming distribution in the Caribbean and Latin America (the "spillover"

4/ 17 U.S.C. § 111(a)(3).

5/ Id.

problem). Notwithstanding this technical ability to exceed U.S. borders, authority to provide programming outside the U.S. may not exist[6/] and, as MPAA has pointed out, is not automatic.[7/] In addition, the proposals are likely to increase the intentional provision of U.S. programming to foreign points, where unauthorized interception cannot be addressed under Section 111 and adequate protection may be unavailable.

6. These existing "loopholes" are additional, compelling reasons for the Commission to factor in the concerns of U.S. program owners in its implementation of the proposals of the Notice through its own licensing process.[8/] The Commission cannot, and should not attempt to, solve the copyright problem completely. The Commission can and must, however, act within its existing authority, obligations and precedent to deter as much as possible the illegitimate use of U.S. program product under color of, or as a result of, FCC fixed-satellite authorizations. In light of the "loopholes" and Section 111(a)(3) in particular, the Commission should assure that U.S.-licensed carriers act responsibly with respect to their own activities, and that they

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6/ Capital Cities Additional Comments at 3.

7/ Comments of MPAA at 6 (filed June 8, 1995).

8/ Home Box Office ("HBO") also notes the piracy problem and potential in its opening comments (for example, "... certain proposals [in the Notice] may adversely encourage the piracy of programming services outside the territories where the distributors are authorized to sell." HBO Comments at 16.).

have an FCC-required role with respect to recipients, intended and unintended, of their satellite transmissions.

7. In opening Comments MPAA suggests specific ways to do that, including the conditioning of authorizations upon copyright compliance and deterrence of misuse of U.S. programming. Both MPAA and Capital Cities cited language already used in satellite authorizations indicating that FCC authority does not include the right to distribute programming "where the appropriate copyright clearances have not been obtained or where the U.S. government [such as U.S.T.R.] has determined that appropriate copyright protection does not exist."[9/] In addition, MPAA recommends that conditioning language be adapted, for use in terrestrial and space segment authorizations, from a condition currently used in earth station authorizations, to the effect that:

> These facilities shall be used only for the transmission [or reception] of programming material that the licensee has been authorized to transmit [or receive] and use by the owner of the programming material.[10/]

8. MPAA also recommended that applicants be required to certify that they will seek to prevent the unauthorized use of programming they distribute. MPAA endorses, as effective corollaries to this step, the Capital Cities suggestions that operators (1) obtain, and maintain on file, representations from

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9/ MPAA at 6; Capital Cities Additional Comments at 4.

10/ Report No. DS-1544: Satellite Communications Services, Public Notice released June 21, 1995.

their customers that the originator of any domestic signal carried by a programming service customer of the satellite operator authorizes the foreign distribution of that signal, and (2) that an operator obtain and maintain on file a representation from its customers, such as programming services, that appropriate copyright clearances have been obtained from all of the customers' authorized receive points.[11/] At a minimum, the Commission should require its licensees to make publicly available the identity of customers of signals in foreign countries, to facilitate monitoring and enforcement to promote legitimate use of U.S. product there.

9. MPAA also endorses the Capital Cities suggestion that the Commission should order satellite operators to show cause why they should not be required to cease carrying transmissions that appear to violate Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. § 605, or copyright provisions.[12/]

10. Concerning FCC licensing of foreign entities to provide domestic service, several commenters, such as AT&T, make the point in opening comments that foreign entry to the U.S. market should be tied to an "effective opportunity" for U.S. interests to compete in the applicant's home market.[13/] MPAA, in its

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11/ Capital Cities Additional Comments at 6.

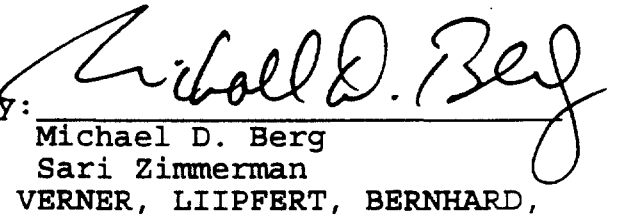
12/ Id.

13/ Comments of AT&T at 16-17 (filed June 8, 1995).

comments in the Commission's market entry rulemaking proceeding, advocated taking market openness into account as part of the FCC's domestic licensing responsibilities. MPAA also proposed including content-related issues, such as the extent to which foreign markets are open to the provision of U.S. video and audio programming, in FCC authorizations of foreign entry to the U.S. market.[14/] In the instant proceeding, it is important that this market openness be defined to encompass both market access (including the absence of quota restrictions) for U.S. programming, and adequate protection for U.S. programming product. Competition cannot be fair or effective if the unauthorized use of product is not deterred and remedied.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 

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June 23, 1995

14/ Comments of MPAA in IB Docket No. 95-22 at 3 (filed April 11, 1995).

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